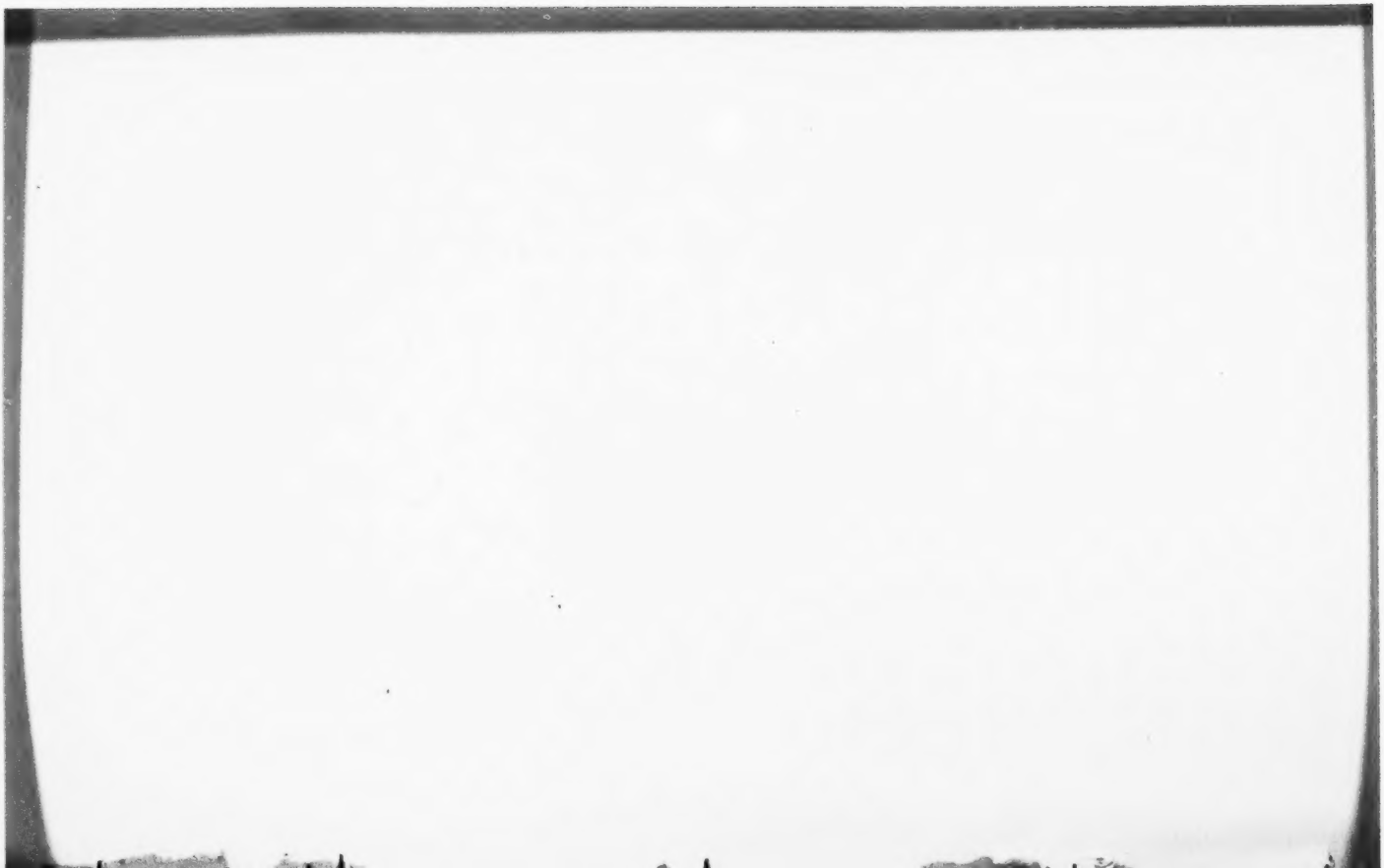

No. 93.
Brief of Bunn for P. E.
Filed Oct. 22, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 93

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS,

Plaintiffs in Error,

vs.

PATRICK R. SMITH.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PLAINTIFFS IN ERROR

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STATEMENT OF FACTS.

This is a writ of error to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment determining that Patrick R. Smith (plaintiff in the Circuit Court) is entitled to possession of the lands in controversy and to recover from plaintiffs in error the sum of $30,024.21 damages for withholding said property.

The action is brought by Smith in the Circuit Court of the United States for North Dakota. The property in dispute is described in the complaint as lots 5, 6, 7, 8, 9, 10, 11 and 12, block 8, according to the plat of Bismarck, North Dakota. In fact, it is, and has been since the construction of the Northern Pacific Railroad, occupied by the main and yard tracks of that road in Bismarck, and all lies within 200 feet of the center line of the main track.

The Railroad Company in its answer alleged lawful possession and title under the charter of the company (Act of Congress July 2, 1864). The answer pleads also a general denial and former adjudication in favor of the Railroad Company in the courts of the Territory of Dakota: (Transcript, p. 5).

The Circuit Court on a former trial rendered judgment on the merits against the plaintiff, which was reversed by the Circuit Court of Appeals: *Smith* vs. *Northern Pacific R. R. Co.*, 58 Fed. Rep. 513, 7 C. C. A. 397. On the second trial the judgment was rendered which is here for review; it was affirmed by the Circuit Court of Appeals, 69 Fed. Rep. 579: (Transcript, p. 60).

The case at the Circuit was tried by the court, a jury being waived. The court's findings are at pp. 15–17 of the Transcript. A bill of exceptions was settled and is printed at pp. 20–46 of the Transcript. The findings show this state of facts:

The plat of Bismarck was formerly known as Edwinton, its name having been changed by act of the legislature. The property in dispute was part of an 80 acre tract entered by John McLean as mayor of the city of Bismarck on behalf of its inhabitants under the Townsite Act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21, 1879: (Transcript, p. 15). The corporate authorities subsequently conveyed to the defendant in error: (Transcript, p. 15).

The court further finds that this 80 acre tract was selected as the location of a portion of the townsite prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior & Puget Sound Land Company (which company made such selection) sold lots upon this townsite according to a plat which was afterward, February 9, 1874, recorded with the Register of Deeds of the County. By January, 1873, thirty buildings had been erected on the townsite, and from that time to 1879, when patent issued, the population continued to increase. It was upon the townsite *thus* selected and the plat *thus* made, which was afterward adopted as the site of the City of Bismarck, that the patent to McLean was based. The pat-

ent contained no reservation of any right of way for the Railroad Company: (Transcript, p. 16).

Note that no selection or entry was made by the TOWN *authorities, and no proceedings instituted in the land office (so far as the record shows), prior to patent July 21, 1879.*

The public survey of the township containing the 80 acre tract was made in October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

The foregoing is the title of the Defendant in Error. That of the Northern Pacific Railroad Company is as follows:

The company claims under the act of July 2, 1864, creating the corporation, sec. 2 of which act grants to the company a right of way 200 feet on each side of the *railroad* where *it* (the railroad) may pass through the public domain. On February 21, 1872, the company filed in the Interior Department its map of general route east of the Missouri river. This route passed about three-quarters of a mile south of the said 80 acre tract. May 26, 1873, it filed its map of definite location, which was accepted by the Commissioners of the General Land Office. The line of definite location, according to this map, passed about two miles south of the land in dispute. During 1872 some grading was done on the map line. During 1872 the company staked out a line across the property in question substantially where the track was afterwards built. This line was graded in 1873, and in June, 1873, the track laid where it has ever since been. The grading on the map line two miles south was abandoned. The property is within two hundred feet of the main track as constructed: (Transcript, p. 16, 21).

As to former adjudication the facts found by the court are: In the year 1877 the Railroad Company commenced an action in the District Court of Burleigh County, Territory of Dakota, in which county the premises were situated, against Patrick R. Smith, defendant in error here, and others, to recover possession of part of the premises in question, Smith being then in possession. The court had jurisdiction of the parties and sub-

ject matter, and the Railroad Company recovered a judgment against Smith for the possession of said premises, and nominal damages for withholding the same: (Transcript, pp. 16, 17).

The complaint of the Company in the former action alleged "that the Northern Pacific Railroad Company is a corporation created by and exists under an act of the Congress of the United States entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' approved July 2, 1864. * * * * That in May, 1873, plaintiff became seized in fee for the use and purpose of a right of way to the following premises." Smith was alleged to be in actual and wrongful possession. He demurred to the complaint. The demurrer was overruled, and judgment thereupon rendered for the company to the effect before stated: (Transcript, pp. 12–15).

It is agreed in the record that the value of the use of the whole premises here in question was $26,000, and omitting that part thereof described in the complaint in the former action, $21,000: (Transcript, p. 10). The plaintiff's recovery below was for $26,000 and interest, and for possession of the whole property. The former adjudication was held to be no bar either in whole or part to this action. A finding dividing the damages was requested, denied and exception taken: (Transcript, pp. 43–45).

Upon the trial plaintiff in error offered in evidence the complaint in said former action to show that the plaintiff in error there claimed the land as its right of way under the act of 1864, and recovered it in the former action upon that ground. This evidence was excluded by the court and the plaintiff in error excepted: (Transcript, p. 35).

Upon the trial plaintiff in error offered to prove that after its road had been constructed over and beyond the premises in dispute, commissioners were duly appointed by the President of the United States under the provisions of sec. 4 of its charter, to examine and report

thereon; that they performed their duty and transmitted their report to the secretary of the interior, by whom it was forwarded to the President November 28, 1873; that this report was approved by the president December 1, 1873; that the report referred to contained an exact statement of the location of the constructed line of plaintiff in error, and an approval thereof. This offer was rejected and plaintiff in error excepted: (Transcript, pp. 22–30).

The plaintiff in error offered in evidence on the trial depositions of two civil engineers, Charles A. F. Morris and Montgomery Meigs. These depositions are in the record, and they tend to show that lines of definite location on maps are not necessarily or usually the exact lines of construction. That actual construction deviated in this case, and customarily does on all roads, from the map of location for good engineering reasons; that difficulties always develop and economies become apparent upon construction, which cannot reasonably be foreseen at the time of location. These depositions were excluded by the court and plaintiff in error excepted: (Transcript, pp. 31–41).

It will be noted that all the maps and public documents referred to in the findings, stipulations and bill of exceptions (or copies thereof) are made part of the record and may be used, read or referred to by either party and considered by the court: (Transcript, pp. 45–46).

The material parts of the act of July 2, 1864, are sec. 2 and sec. 3 which are as follows:

> SEC. 2. AND BE IT FURTHER ENACTED, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said Corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof; said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for sta-

tion buildings, workshops, depots, machine shops, switches, sidetracks, turn-tables, and water stations, and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of this act, and acquired in the donation to the (road) named in this bill.

SEC. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the "Northern Pacific Railroad Company" its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitons of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, That the railroad company receiving

the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word "mineral," where it occurs in this act, shall not be held to include iron and coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said "Northern Pacific Railroad."

ASSIGNMENT OF ERRORS.

The Plaintiffs in Error assign upon this record, and will rely upon, the following errors:

1. The courts below erred in ruling and holding that the Northern Pacific Railroad Company did not have title to the land in controversy as part of its right of way under sec. 2 of the act of July 2, 1864.

2. The courts below erred in ruling and holding that the defendant in error did have title to the land in controversy under the patent to McLean of July 21, 1879, and the subsequent conveyance under said patent to defendant in error.

3. The courts below erred in ruling and holding that defendant in error had any title or right to the possession of said premises.

4. The courts below erred in ruling and holding that said former judgment was not a bar to this action, and in excluding from evidence the record in said former action.

5. The courts below erred in ruling and holding that said former judgment was no bar, at least as to that part of the premises involved directly in the former action and as to $5,000.00 and interest of the judgment for damages awarded.

6. The courts below erred in excluding from evidence the testimony showing the acceptance by Commissioners and by the President of the constructed line under the act of July 2, 1864.

7. The courts below erred in excluding from evidence the deposition of Mr. Morris and Mr. Meigs.

ARGUMENT.

QUESTION OF TITLE.

The right of way granted to the Pacific roads was a vital part of the aid granted them by Congress. The country through which the Northern Pacific was projected to run was public land inhabited largely by unfriendly tribes of Indians. The road was to cross vast regions, passing for a thousand miles through what was called the Great American Desert, crossing three ranges of mountains, the waters of the Mississippi, Missouri, Yellowstone, Clark's Fork and Columbia. The military necessities of the government were one of the prime reasons for its construction. The great undertaking would have been absolutely out of the question without the congressional grant of a right of way. The right of way was of more vital necessity than the land grant. These observations have the approval of this court expressed in *Railroad Company* vs. *Baldwin*, 103 U. S. 426.

Sec. 2 of the act of July 2, 1864, not inferentially or by construction, but, as we think, in the plainest and most explicit terms, grants to the Northern Pacific Company the property here in dispute. Note the express and clear language of sec. 2 and contrast it with the language used by Congress in sec. 3. Sec. 2 grants the right of way. Sec. 3 relates entirely to the odd sections of public land granted by Congress to aid the enterprise. The two sections relate entirely to different things and have no connection with or dependence upon each other. The grant in sec. 2 is unconditional, and would take effect without the company complying with the conditions of sec. 3.

Sec. 2 says:

> "Said way is granted to said railroad to the extent of two hundred feet in width on each side of *said railroad* where *it* may pass through the public domain."

This grant is plain, unambiguous and unconditional. There is no reference in this section to the company filing any map of location. No condition attaches to the right of way grant except those necessarily implied, such as that the road shall be constructed and used for the purposes designated, and built upon the general route defined in the act of congress, namely: from Lake Superior to Puget Sound, by the Northern Route. What is granted is therefore two hundred feet on each side of the railroad itself where the railroad may pass (that is, where it may be actually constructed) through the public domain. It is the construction of the road itself which defines the right of way. The map spoken of in sec. 3 has absolutely no connection with or relation to the right of way, and was required only for the use of the General Land Office in connection with the disposal of the public domain. Had the company built its road it would have become entitled to the right of way granted under sec. 2; it might have failed entirely to file any map of location and so forfeited its land grant under sec. 3, but such failure would not have forfeited the right of way. The map referred to in sec. 3 is not a condition of the attachment of the grant of right of way, and has no relation to it or effect upon it.

The foregoing views are distinctly held in *Central Pacific Railroad Company* vs. *Dyer*, 1 Saw. 641, where the opinion was delivered by Mr. Justice Field, sitting at the Circuit with the District Judge. In that case a bill was filed by the Central Pacific road against parties who claimed title to the right of way of the road by virtue of purchases from the United States after the Central Pacific grant and before the company had filed its map of location. It was argued that the grant of right of way was subject to the same limitation which was prescribed by the act in regard to the land grant, namely, that what

the United States might reserve, sell or otherwise dispose of before the map of definite location was filed was excepted from the company's grant. But the court said:

> "The construction for which the defendants thus contend is clearly incorrect. The grant of the right of way is a present grant operating immediately upon the passage of the act without reservation or exception, and is subject to no conditions except those which are subsequent, or necessarily implied, such as that the road shall be constructed within the period specified, and be afterward maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section apply only to the grants of land therein mentioned, and do not apply to the grant of the right of way made in the second section.
>
> "The provision of the seventh section, requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the Department of the Interior, in no respect affected the grant of the right of way; it only furnished the means by which the Secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private entry and sale."

Contrast the language of sec. 2 with that of sec. 3. Sec. 3 grants twenty alternate sections per mile on each side of the RAILROAD LINE AS THE COMPANY MAY ADOPT, whenever the United States has full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claim, or rights AT THE TIME THE LINE OF SAID ROAD IS DEFINITELY FIXED AND A PLAT THEREOF FILED IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE. It also provides that whenever lands have been granted, sold, reserved, occupied, pre-empted or otherwise disposed of before the map of definite location is fixed, the company is granted other lands in lieu thereof, so as to make up the full quantity intended to be conferred by congress. By sec. 6 the President was to cause the granted lands to be surveyed

forty miles in width on each side of the road after the general route should be fixed. Maps were required to be filed in order that the government might know what to survey, and that the General Land Office might be able to adjust the railroad grant of alternate sections and determine what lands were patentable to settlers.

But the government had no survey to make in order to determine the right of way. The General Land Office had no duty to perform with respect to the right of way. The matter was not material to settlers and the right of way was not provided to be patented to the company. It has always been the practice of the land department to patent lands without condition to settlers, although they were subject to a right of way grant made prior thereto by congress.

We think these principles were decided by this court in *Railroad Company* vs. *Baldwin*, 103 U. S. 426. Baldwin claimed certain land in Nebraska under a title from the United States acquired in October, 1869. The company claimed a right of way under its grant of July 23, 1866, but did not locate its road over this land until October, 1871. This court decided in favor of the congressional grant, holding that the definite location by map thereof required in that part of the act granting alternate sections was not a condition of the right of way grant taking effect; that the grant of right of way was a present unconditional grant, a float finally attaching and becoming fixed upon and according to the actual construction of the road.

The court by Mr. Justice Field said in that case:

> "The act of Congress of July 23, 1866, c. 212, makes two distinct grants: one of lands to the state of Kansas for the benefit of the St. Joseph and Denver City Railroad Company in the construction of a railroad from Elwood in that state to its junction with the Union Pacific *via* Maryville; the other of a right of way directly to the company itself. The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. The grant of them was subject to the condition that if, at the time the line of the road was definitely fixed, the United States had

sold any section or a part thereof, or the right of pre-emption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated, which should be held by the state for the same purposes. The limitations upon the grant are similar to those found in numerous other grants of land made by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the meantime any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption, and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired. The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in præsenti*. The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this court to similar language in other acts of congress. *Missouri, Kansas & Texas Railway Co.* vs. *Kansas Pacific Railway Co.*, 97 U. S. 491; *Leavenworth, Lawrence & Galveston Railroad Co.* vs. *United States*, 92 Id. 733.

"But the grant of the right of way by the sixth

section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

"We see no reason therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

Se also in support of our argument, *Hamilton* vs. *Ry. Co.*, 2 Idaho 898; *Railway Company* vs. *Douglas Co.*, 31 Fed. Rep. 540, by Mr. Justice Brewer; *Bybee* vs. *Ry. Co.*, 26 Fed. Rep. 586; *Doran and Wilson* vs. *R. Co.*, 24 Cal. 246.

It should be a matter of common knowledge of which this court will take notice, and it is also a matter which the plaintiffs in error offered to prove by testimony on the trial, that when it comes to the actual building of a railroad, engineering difficulties make themselves apparent and economies are shown to be possible, which could not be reasonably foreseen and determined when the location was made. This being true, no land grant road has been constructed for any considerable distance, especially in regions full of engineering difficulties and comparatively unknown, without changes in the constructed line from the map line. Location without construction would give the company no title to right of way. It results, if the decision below is correct, that in such places a railroad company has no title on either its located line or constructed line. Congress must have appreciated that alterations of route were frequently necessary upon construction, and it could not have been the intent of Congress that its purpose to grant right of way should be wholly defeated by such alterations of route.

Moreover, there has probably never been a map filed with the Interior Department locating any land grant road, which was drawn on sufficiently large a scale and with sufficient accuracy of detail, so that the land department could *exactly* locate the right of way from such map. And there is no reason why the land department should be able to locate the right of way, for, as we have before said, it is not the practice of the land department to make an exception or reservation of rights of way in its patents to purchasers. The land department has never required maps to be filed for the purpose of defining a land grant to be sufficiently accurate so that the department could also therefrom define the right of way. And if the decision below is to stand, it affords good ground for a controversy between every land grant road and every land owner along its line as to the boundary between them. The policy of the law should be to make such controversies impossible, and this can only be accomplished by holding that the laying down of the rails defines the boundary.

It has been held that a company may change its map line under general act of 1875 Kan Pac R. v. N C

The case of *Missouri, Kansas and Texas Railway Company* vs. *Cook*, 163 U. S. 491, was not argued orally in this court, and in view of the prime and wide importance of this question we feel warranted in urging a further consideration, more especially inasmuch as it seems to us the Cook case overrules the Baldwin case, while, judging from the opinion, it was the intention of the court to re-affirm and follow the Baldwin case. The learned Chief Justice says, in the Cook case, p. 496: "That by the filing of the map the route was definitely fixed within the intent and meaning of the act." So far there can be no dispute, our whole point lying in the proposition that definitely fixing the route has nothing to do with fixing the right of way. The opinion then continues to say: "And while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way." But we ask why such map filing cannot otherwise than operate to locate the right of way? The map was for the department. The department had nothing to do with surveying or staking off the right of way. It was no part of its duty to establish that boundary as between the company and adjoining settlers; it did not reserve right of way in its patent; it did not care where the right of way ran; its duties consisted in defining the odd sections which came to the company's grant, fixing the losses and selecting the indemnities therefor. Again, on page 497, the opinion in the Cook case, after citing authorities in this court, which establish the admitted rule that a change in route adopted by the railroad company does not change the alternate sections covered by the grant, does not shift the grant laterally, says: "The same conclusion necessarily followed in respect of the right of way." We ask, why necessarily followed? The reasons why the land grant should not be shifted from one section to another are plain. Settlers had to be protected. But, as this court said in the Baldwin case, the same reasons do not apply to the grant of the right of way. It is not disputed, as the opinion in the Cook case

holds, that both grants were grants *in præsenti*, but one was a grant free of conditions, the other a grant on conditions. The right of way was granted absolutely, and according to the plain terms of sec. 2 would attach to any public land owned by the United States at the date of the act, without the company filing any map, and as against purchasers from the United States after the passage of the act, while, on the other hand, sec. 3 lays on the grant of alternate sections the express condition that a map shall be filed, and says that the grant shall attach according to such map. And as said in the authorities we rely upon, the policy of congress to settle the country required the filing of a map to designate to the department the alternate sections granted, while there was no policy of congress which required the department to be advised of the exact limits of the right of way.

The whole matter could not be better summed up than in the language of this court in the Baldwin case in speaking of the condition or qualification of sec. 3 as to filing a map.

> "Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

But if the case of *Missouri, Kansas and Texas Railway* vs. *Cook* is an authority to be followed, it is still not controlling of this case. The stipulation of facts in that case contained this clause: "But the route of said road on its present location has never been approved by the President of the United States unless such approval is shown by the other facts herein admitted." There were no facts stated in the stipulation which showed any action by the President approving the constructed line.

Sec. 4 of the Northern Pacific act provides that whenever twenty-five consecutive miles of any portion of the road is ready for service, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that said road has been completed in good, substantial and workmanlike manner, and

in all other respects as required by the act, the commissioners shall so report to the President and patents shall be issued to the company. The stipulation and evidence offered by the plaintiffs in error (which were excluded by the court on the trial and an exception taken) show that the road having been completed, commissioners were appointed under the act and reported November 24, 1873, that the road had been properly located under the act and properly built. November 28, 1873, the Secretary recommended the acceptance of this report. The recommendation was approved by President Grant December 1, 1873. The land on which the road was built was public land at this time. It is now settled that mere occupation without the filing of any claim in the land office does not attach any private rights to the land as against the United States. *Northern Pacific Railroad Company* vs. *Colburn*, 164 U. S. 383. Therefore the buildings put on some part of this 80 acre tract in 1872 and 1873, and the sale of lots according to a plat by the attorney of the Lake Superior and Puget Sound Land Company did not change the character of the land as public land. The patent under which defendant in error claims, issued in 1879, and the entry in the land office on which that patent was based was made September 14, 1876.

This executive action in 1873 constituted an acceptance of the constructed line by the United States in satisfaction and performance of the requirements of the company's charter. This acceptance should be held to estop the United States and its subsequent grantees to deny that the constructed line is the line intended by Congress, and therefore to deny that the land in dispute is subject to the right of way of the plaintiff in error. On the other hand, in *Missouri, Kansas and Texas Railway* vs. *Cook*, the land in question was purchased of the United States October 9, 1867 and a certificate in due form on that day issued to the purchaser upon which a patent followed November 1, 1870. Prior to the 24th of December, 1867 the company in that case had surveyed a different route which did not touch the quarter section in question, and after the purchase from the United States the company

made a re-location between May 1, 1870 and June 6, 1870, and built its road on the new line. In that case there was therefore an existing established line not touching the land at the time the purchaser made entry, which might in some degree operate to estop the company from afterwards changing its line to the disadvantage of such purchaser. But here the road was built on the ground where it now is and the right of way was in the possession of the company, trains had been running over it for many years before the entry was made and patent issued under which defendant in error claims. Defendant in error took his title from the company's grantor with full notice by the company's open possession ~~and~~ of its claims.

FORMER ADJUDICATION.

We submit that the former judgment is a bar and estops defendant in error from maintaining this action. In 1877, before Mr. Smith received his deed from the corporate authorities of the city of Bismarck, he was in the possession of a part of the premises in question and the company obtained a judgment for recovery of possession and for damages in an action against him. The learned Circuit Court of Appeals decided that this judgment was not a bar because defendant in error relies in this case on a title subsequently acquired. But let us examine the correctness of that conclusion. We do not question the general doctrine that ejectment is not a bar as to subsequently acquired title. But that doctrine has its limitations and has no application to this case. Confessedly plaintiff in ejectment being defeated may buy another title and sue again. Probably it is also true that in many cases, perhaps in ordinary cases, defendant in the first ejectment may buy in a hostile title and prove it in another action. The authorities cited in the opinion of the Circuit Court of Appeals go no further than this. But this case is quite different. In ejectment the plaintiff's pleading is customarily general, simply alleging title in himself, but the plaintiff may at his election set forth his

chain or source of title. And it is elementary that the pleadings and whole record in an action may be introduced in another action to show exactly what question or issue was decided in the first.

Here the railroad company in the former action, as it had a right, made a specific allegation in its complaint that it was the corporation created under the act of July 2, 1864, and that the premises in question were by that act granted to it by the United States as part of its right of way. Now, the defendant in that action (Smith) being in possession, did not need any title of his own to defeat the plaintiff. It is elementary that the plaintiff had to recover in that action on the strength of its own title, not on the weakness of the defendant's title. Therefore, when Smith demurred to the complaint the issue was squarely made between him and the railroad company, whether the United States had made a valid grant of right of way to the company covering this land by virtue of the act of Congress. This issue was adjudicated in favor of the company and is precisely the issue which defendant in error seeks to bring again into litigation in this action.

The case would be entirely different if the complaint in the former action had been in general terms only, to the effect that the company owned the land. For then the judgment would not show what issue was determined and it might be open to Smith to rely here on an after-acquired title. In this case both parties claim under the same source of title—from a common grantor. Both admit that the land belonged to the United States on July 2, 1864. If the United States on that day made a valid conveyance to the company, no question or issue remains as to the effect of its patent to McLean. That patent was void if the conveyance to the company was good. So the issue in this case narrows down to this; whether the United States conveyed this land to the railroad company by the act of 1864. This specific issue was determined in favor of the company as between it and Smith in the former action, and on the plainest principles the former judgment must be held a bar.

To illustrate, suppose A sues B in ejectment, A setting forth in his declaration that C being the owner of the land at a certain time, made on a day named, a valid conveyance to the plaintiff. Issue is joined upon the scope and validity of C's conveyance to A, and it is adjudged that such conveyance is good, and passed to A a title to the property, or at least what interest C had. After this judgment B obtains and takes to himself a second conveyance from C, confessedly covering the same interest and title which C had at the date of the former conveyance, and on this new title he sues A in a second ejectment. It will not do for B to rely on the proposition that the former judgment is not a bar as to his subseqently acquired title. He has bought from the same grantor the same title which A claims to have bought previously. A has a perfect answer to his ejectment in the fact that the former action adjudicated that C's title passed to him by the prior conveyance. In the case at bar, if the United States conveyed to the company it had nothing left to convey to McLean. That it did convey to the company was adjudicated as between Smith and the company in the former action. Smith, now relying on a subsequent conveyance of the same title and interest from the same grantor, cannot recover without impeaching the fact decided by the former litigation, to-wit: that the United States conveyed this land to the railroad company July 2, 1864. It is not a case of after acquirement of a new title; but attempted acquirement of the very title adjudicated to be in the railroad company by the first judgment.

It is fundamental that a former judgment between the same parties is conclusive upon every question of fact directly involved under the issues in the former action and shown to have been actually litigated and determined therein. The estoppel of a judgment, while not extending to points not in issue, does cover every point which is in issue. And if the company's title—the same title which it now asserts—was the issue in the former action the former judgment is a bar. The case comes plainly within the principle so often decided by this

court, that where the second action between the same parties is upon a different claim or demand, judgment in a prior action is an estoppel as to matters in issue or points controverted upon which the former decision was rendered. *Bryan* vs. *Kennett*, 113 U. S. 179; *Cromwell* vs. *Sac County*, 94 U. S. 351; *Davis* vs. *Brown*, 94 U. S. 423; *Hornbuckle* vs. *Stafford*, 111 U. S. 389; *Chapman* vs. *Smith*, 16 How. 114; *Packet Co.* vs. *Sickles*, 5 Wall. 580; *Miles* vs. *Caldwell*, 2 Wall. 35; *Keokuk & W. Ry. Co.* vs. *Missouri*, 152 U. S. 301; *Nesbit* vs. *Riverside Independent Dist.*, 144 U. S. 610; *Wilmington & W. R. R. Co.* vs. *Alsbrook*, 146 U. S. 279. See also *2 Smith's Lead. Cases*, 7th Am. ed., top p. 786.

A question which has been judicially determined cannot be freed from the estoppel by a change in the form of the cause of action. *2 Smith's Lead. Cases*, 7th Am. ed., top p. 764. In order to know what is within the estoppel we must look beyond the former judgment to the demand or allegation of the pleadings, and the judgment precludes the parties from disputing any point or matter of fact which has been once put distinctly in issue. *Outram* vs. *Morewood*, 3 East. 346, decided the principle that recovery upon an issue joined as to title is conclusive as to that title in a subsequent action; that it is the matter alleged and upon which the recovery proceeds which is concluded.

If the former judgment is an estoppel it seems clear that such estoppel extends to the whole property involved in this action, although only a portion of it was directly involved in the former action. The property now in question is one parcel, being a strip of land occupied and claimed by the railway company as its right of way. The tracks not covering the entire right of way, Smith at the time of the institution of the former action was in possession of a part of this entire parcel. The adjudication that the property then sued for was a part of the company's right of way under its grant necessarily involved an adjudication that the whole strip was part of its right of way; for the right of way could not attach as to a twenty-five foot strip and fail to attach as

to the remainder. Smith could not by taking possession consecutively of small pieces of one entire parcel of land compel the company to re-litigate with him as to each piece its title, which attached to the whole if it attached at all. *Aurora City* vs. *West*, 7 Wall. 82; *Beloit* vs. *Morgan*, 7 Wall. 619.

C. W. BUNN,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
PATRICK R. SMITH.

No. 93.

ADDENDA TO BRIEF FOR PLAINTIFF IN ERROR.

Congress has sometimes included a grant of right of way in an act also granting other public lands; in other cases acts have related solely to right of way. But in all cases the grant of right of way has been according to the *road*, or *track*, where it might be built. In acts granting right of way only there was commonly no requirement that a map be filed.

Reference may be made to the following acts concerning right of way solely:

Act of March 3, 1835, Vol. 4 Statutes, p. 778, granting right of way for a railroad from Tallahassee to St. Marks in Florida, "*the land over which the said road shall pass and thirty feet on each side of the same.*" (No location map mentioned.)

An act of March 3, 1873, Vol. 17 Statutes, p. 612, granting right of way in very similar terms for the Utah Northern road, required a map to be filed within one year showing the location of the road.

Act of June 20, 1874, Vol. 18 Statutes, p. 130, granting right of way to the Nevada County Narrow Gauge Railroad Company "fifty feet in width on each side of said railroad *where it may pass* through the public domain." (Location map required.)

Act of June 23, 1874, Vol. 18 Statutes, p. 274, granting right of way to Arkansas Valley Railway Company. (Same language as act last above.)

Act February 5, 1875, Vol. 18 Statutes, p. 306, granting right of way to Oregon Central Pacific Railway Company "one hundred feet wide on each side of the central line of said road." (Map required in terms substantially of general right of way act of 1875.)

No. 93.

Brief of Bunn for P. E.

FEB 1
JAMES H. M

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 93.

Filed Feb. 9, 1898.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS.

Plaintiffs in Error.

vs.

PATRICK R. SMITH.

BRIEF OF PLAINTIFFS IN ERROR ON RE-ARGUMENT.

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vs.

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BRIEF ON RE-ARGUMENT.

The order made opens the whole case for re-argument. For the most part we shall abstain from repeating what is said in the brief filed on former argument, but at the risk of repetition we wish to call the particular attention of the Court to the facts shown in the record.

The complaint of the plaintiff (Transcript, p. 2) alleged that on the fourteenth day of September, 1876, the plaintiff *became* and ever since has been and still is duly seized in fee simple, etc. *The plaintiff does not claim any title or possession anterior to September 14, 1876.* This action was commenced on the twenty-eighth of December, 1891 (Transcript, pp. 3 and 4).

The answer of the defendant (Transcript, p. 5) alleged, that the land mentioned in the complaint was within two hundred feet of the center line of its railway, and had been for more than twenty years in the defendant's lawful possession as its right of way, roadbed and depot grounds. The plaintiff's reply (Transcript, pp. 6 and 7) denied that the land had been in the possession of the defendant for twenty years, but admitted and

averred, that the southerly half of the premises had been unlawfully used and possessed by the defendant, partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same for purposes connected with shipment and receipt of freight to and from the railroad of said defendant, for a period of eighteen years last past, and that the northerly half of the premises had been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same.

The pleadings therefore admit possession of the defendant for eighteen years before the action was commenced, that is, from December, 1873.

The facts as to possession stipulated by the parties (Transcript, p. 9) are, that during the year 1872 the Railroad Company staked out a line across the eighty-acre tract (of which the premises described in the complaint are a part) substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the month of June, 1873, the Railroad was constructed across this tract, and has since remained and been operated upon it. The lots described in the complaint are within two hundred feet of the main track of defendant's railroad as actually constructed, and have been occupied by the defendant and its tenants during the period in question (*i. e.* since June, 1873), but no part of the same except the rear twenty-five feet thereof has ever been occupied for railroad purposes.

The other part had doubtless been occupied by parties to whom the Railroad Company leased the same for purposes connected with shipment and receipt of freight to and from the railroad.

These facts so stipulated were found by the Court.

It is therefore conclusively shown, that the Railroad Company took possession of the premises in June, 1873, and had been in possession for over eighteen years before this action was brought; that the Railroad Company claimed the land as part of its right of way, that is, as public land of the United States granted to it by Congress by its charter of July 2, 1864.

On the other hand, the title of the defendant in error arises under a patent to John A. McLean, as Mayor of the city of Bismarck, under the townsite act (Rev. Stats., Sec. 2387). This patent was issued July 21, 1879, six years after the Railroad Company had taken possession of the premises in question. It covered eighty acres, of which the premises sued for constitute a small part. There can be no presumption in favor of a plaintiff in ejectment; *there is no proof or suggestion in the record that the plaintiff's title had its inception before the issue of patent, or that it related back of that date*, unless, indeed, it be the allegation in plaintiff's complaint, that he became seized on September 14, 1876. Even the latter date was over three years after the Railroad Company took possession. But if the Court will take notice of the entry which underlies the patent, it will be found by the Land Department records to have been made September 14, 1876. It is significant that this is the very day fixed by plaintiff in his complaint, as the inception and origin of his seisin and title.

It should be distinctly borne in mind that there is not a word in the record which shows, or suggests, *any* possession *of the premises in question* prior to the possession of the Railroad Company. The finding is, that the eighty acre tract on which these lots were situated was selected as the location of a townsite by the Lake Superior and Puget Sound Land Company in 1872, and that by the first of January, 1873, thirty buildings had been erected on the townsite. This does not imply, or suggest, possession by any person of *that part of the eighty acres constituting the premises described in the complaint*, antedating the possession of the Railroad Company. On the contrary, the Railroad Company staked out its line across the eighty acre tract, where it was afterwards built, in 1872, and built its line in June, 1873. No doubt the location by the Railroad Company brought the population. If the railroad had gone two miles south, the townsite and the city of Bismark would have been two miles south. No claim can possibly be made upon the record that the inhabitants of the city of Bismarck, or any one of them,

or the plaintiff, questioned, or contested the right, or the possession, of the Railroad Company when the road was built. *The record shows the Railroad Company to have been the first possessor of that part of the townsite described in the complaint.*

The corporate authorities of the city of Bismarck conveyed the lots sued for to Patrick R. Smith sometime subsequent to the issue of patent, that is, after July 21, 1879. The exact date is not shown in the record. The Railroad Company had therefore been in open, notorious and constant possession of this property, as part of its right of way, yards and depot grounds, for over six years at the least before the plaintiff obtained the deed upon which this ejectment is founded; and many years elapsed after that before this action was commenced.

I.

We will first consider the questions to which the Court in the order for reargument directs special attention of counsel. The first question suggested is this:

> "Could occupants of public lands, before they were surveyed and declared open for settlement, by subsequently availing themselves of the town site act, procure a title paramount to that of a Railroad Company, which, under a previous grant by Congress, had taken possession before the town site patent was granted?"

Preliminary to the discussion, we trust the Court is not under the impression, that the particular land sued for in this case was in the occupation of any person, other than the Railroad Company, at any time prior to June, 1873, when the road was built. As we have pointed out the record does not warrant such a conclusion, or inference.

(*a*) We submit that *Ashby* vs. *Hall*, 119 U. S. 526 is controlling. That was a suit to abate an obstruction in an alley in the city of Helena. The plaintiffs were owners of lots bordering on the alley and claimed it for a right of way. The plaintiffs had been in the pos-

session of their lots at the time of the entry of the town site and the alley was existing at that time, recognized by the inhabitants and used for ingress and egress to and from plaintiff's and other lots. The town site patent ran to the Probate Judge as trustee under the act of Congress and the Judge after deeding to plaintiffs their lots, made a new survey and plat which were approved by the county commissioners, on which the alley was not shown; the Probate Judge deeded it to the defendant, no adverse claim having been presented before him. The decision in the case was, that those who were occupants at the time of the entry had a subsisting and valid right, as beneficiaries under the trust created by the law, of which the Probate Judge was trustee; that his subsequent conveyance to a third person, of property so occupied at the time of the entry, was void and inoperative; that the non-presentation of an adverse claim to defendant's application for a deed was immaterial. The title of Probate Judge or Mayor under the townsite law is, in the language of the act, in trust, "for the several use and benefit of the occupants thereof, according to their respective interests"; the case holds, that a conveyance by the trustee contrary to such right of occupation is in violation of the trust and absolutely null and void.

The case was one of collateral attack upon the conveyance of the Probate Judge, being a suit to abate as a nuisance, a fence erected to enclose the alley by a grantee under the Judge. The Court held such enclosure a trespass.

We submit this case cannot be distinguished. The Railroad Company is shown to have been the occupant of the premises here in question at and before the entry under the townsite law and at all times since. The Mayor's deed to Patrick R. Smith, like the County Judge's deed to the defendant in *Ashby* vs. *Hall*, was null and void. Ejectment cannot be maintained upon it against one who, as occupant, is the beneficiary of the trust vested in the Mayor by the act of Congress.

Therefore, we say, that, supposing for the sake of argument the Railroad Company to have obtained no

title under its right of way grant, it has still the possession and the real title under the townsite patent.

The government survey of this township is stated in the record to have been filed in the General Land Office in March, 1873. Prior to this date, as has been shown, the railroad line was staked out across the land in question, and was completed in June, about three months after the survey was returned. The Court, in the question put to counsel, speaks of occupants of public land before survey, subsequently availing themselves of the townsite act and procuring a title paramount to that of a railroad company, which, under a previous grant of Congress, had taken possession before the townsite patent was granted. We suggest that occupants of the townsite in no event acquire rights beyond their several occupations. The act of Congress says that the mayor, or judge, may enter at the land office "the land so settled and occupied in trust for the several use and benefit of the occupants thereof according to their respective interests." The status of unoccupied property it is not necessary to consider in this case; but as to property occupied when the townsite entry was made, the entry is in trust for the particular occupant, and the community at large, as a community, could not acquire any rights as against such occupation. Neither could any individual in the community.

(*b*) Counsel for the defendant in error, in his brief filed on the former argument, speaks in several places of the right of occupants relating back under the townsite law to a date anterior to the entry, but cites no authority for such proposition except *Ashby* vs. *Hall*. Now, that case involved no such holding. All that it was necessary to decide in that case, and all that was decided, as we understand it, is, that *occupants at the date of entry* had an equitable title by virtue of such occupation. No question was involved in that case of such title relating back beyond the entry, and we know of no authority for saying that it does so relate. Counsel in his brief concedes that homestead and pre-emption titles relate to the date of the filing in the land office. This is doubtless correct, except that the settler is protected for ninety days

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before entry by special provision of statute. No reason can, we think, be suggested why the same rule should not apply to a townsite entry, and why it should not be held that mere occupation before entry confers no rights on the occupant; that the land, in spite of such occupation, retains its character as public land of the United States. The government could have repealed the townsite law before entry; no vested right had attached as against the United States. *Campbell* vs. *Wade*, 132 U. S. 34. See *Buxton* vs. *Traver*, 130 U. S. 232.

As to pre-emption, homestead and other similar claims, the rule on this subject is well settled. As Mr. Justice Miller well said, delivering the opinion of this Court in *Simmons* vs. *Ogle*, 105 U. S. 271, 273:

> "For so common is it for squatters and trespassers to settle on the lands of the United States, and so indulgent are the laws in encouraging such settlements, and so numerous are these settlements without claim of right, and such is the impossibility of resisting or ejecting the settlers, or of efficiently asserting the right of possession by the government, that the weight of the inference in favor of any claim of right, whether legal or equitable, against the United States, growing out of mere possession, is very slight indeed."

In the case of *Water and Mining Company* vs. *Bugbey*, 96 U. S. 165, 167, this Court said of the right of a settler:

> "The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the state became absolute as of May 19, 1866, when the surveys were completed."

In *Lansdale* vs. *Daniels*, 100 U. S. 113, 116, this Court said:

> "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." See also *Maddox* vs. *Burnham*, 156 U. S. 544.

The whole subject was recently considered in *Northern Pacific Railroad Company* vs. *Colburn*, 164 U. S. 383, a case where the settler had made no entry at the land

office and afterwards abandoned his settlement. It was held that his occupation without entry conferred no rights and created no claim against the land, which would take it out of a railroad grant that became fixed during the period of such occupation.

Supposing in the case at bar that all the occupants had abandoned their settlements before the townsite entry, would the Court hesitate to hold that the land was ordinary public land, subject to homestead and pre-emption laws, or that it would pass under a railroad grant which became located and fixed during the time of such occupation? The Court we think would find it impossible to distinguish the Colburn case; would find it impossible to distinguish between occupation by fifty people, which might give a right to enter as a townsite, and occupation by one person, which might give a right to enter under the pre-emption law. And if the Colburn case were followed in the case supposed, it would involve a ruling that mere occupation by a community, or number of persons, would no more confer a right to land as against the United States, than would occupation by one person; we fail to discover any good reason why it should.

(c) If, then, the land in question was public land of the United States when the Railroad Company changed its line and took possession, we next submit that the company acquired a perfect title thereto under its right of way grant. This contention, we submit, was decided in the case of *Washington & Idaho R. R. Co.* vs. *Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77.

Section 2 of the Northern Pacific charter makes a present grant to the Railroad Company "to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain." The case last cited arose under the general right of way act of March 3, 1875 (18 Stats., p. 482), which provides "That the right of way through the public lands of the United States is hereby granted to any railroad company * * * to the extent of one hundred feet on each side of the central line of said railroad." Section 4 of the same act provides that a railroad company desiring to

secure the benefits of the act shall, within twelve months after location if upon surveyed lands, and if upon unsurveyed lands within twelve months after survey, file with the land office a profile of its road; and thereafter all lands over which the right of way shall pass shall be disposed of subject thereto.

In the case last cited the Cœur d'Alene Railway and Navigation Company had made three surveys and located upon the ground three lines, two south and one north of the Cœur d'Alene river. A map was filed in the land office under section 4 of the act showing the road to be located on one of the surveys south of the river. But when the company came to construct, it built its line on the survey north of the river, and never filed an amended map. This Court said, p. 97:

> "We agree with the Circuit Court of Appeals in thinking that so far as the United States are concerned there is nothing in the act forbidding a railroad company, having adopted one line of survey along the route provided for in its articles of incorporation, and having filed a plat thereof, to subsequently, and within the time allowed it by law for so doing, adopt another route, and that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened. Such an actual construction and appropriation of one line would preclude the company from asserting any claim to the other lines."

This decision is conclusive, unless the facts involved in that case are essentially different from the facts here. Such facts could be claimed to be different only in two particulars; either because some rights had attached to the land here in question before the road was built, which removed it from the category of public land of the United States, or because the charter of the plaintiff in error is essentially different in this particular from the general right of way act of 1875. We have already endeavored to show, that the land here in question was public land of the United States when the road was built; and the slightest examination of the plaintiff in error's charter will show, that the conclusion, which the

court reached under the act of 1875, would be still more plain and necessary under the charter here involved. For while the act of 1875 (Section 4) provided for filing a map of the right of way in the land office, the charter of the plaintiff in error contained no such provision.

The Court in the C œur d'Alene case adopted, without referring to that fact, the well settled rule of the land office. Two Secretaries of the Interior have ruled under the act of 1875, that section 1 gives the Railroad Company a right of way as specified where its road is actually constructed, and that the company need file no map to secure this right; while Section 4 is construed as not being a condition upon the right conferred by section 1, but as giving an additional right, to-wit: to secure a way, which shall be held and protected for the company, *in advance of construction. St. P., M. & M. Ry. Co.* vs. *Maloney*, 24 L. D. 460; *Dakota Central R. R. Co.* vs. *Downey*, 8 id. 115.

II.

The second question suggested to counsel by the Court can be conveniently considered in connection with the third. The two are as follows:

> 2. "Assuming that the townsite title was, in point of law, prior to that of the Railroad Company, could the City of Bismarck or its grantees maintain an action of ejectment against the Railroad Company?"
>
> 3. "Could Patrick R. Smith, as grantee from the city authorities subsequent to the actual possession by the Railroad Company, maintain either ejectment or an action for the value of the land?"

Assuming that the title of the city of Bismarck was paramount to that of the Railway Company, still the road was built and buildings put upon the land without objection (so far as the record shows) and with the tacit consent of the other occupants of the townsite and of the city authorities. The road had been there many years before the plaintiff bought, and remained there over eighteen years before this action was brought. A time so long, let it be noted, as that any action *for damages for the taking was barred by limitation.*

It is fair to assume a license from, or tacit consent of, the city. Whether the city could revoke that license or consent, and bring ejectment, is probably not necessary to determine. The city has never brought ejectment or claimed damages. The law was stated by this Court in *Roberts* vs. *Northern Pacific R. R. Co.*, 158 U. S. 11, to be: that if an owner of land, seeing a railroad company enter and spend large sums of money in constructing its road, remains inactive and permits the work to go ahead, he cannot afterwards bring ejectment, but is restricted to his action for damages. Numerous cases sustain this proposition besides those cited by the Court in its opinion. See *Kanaga* vs. *Ry. Co.*, 76 Mo. 207; *Dodd* vs. *Ry. Co.*, 108 Mo. 581; *Evansville Ry. Co.* vs. *Nye*, 113 Ind. 223.

As to the right of Mr. Smith, it is well settled he can maintain no action, either of ejectment or for damages. He bought *cum onere;* his rights are subject to the easement established and existing when he bought. The presumption is that he paid only what the land was worth subject to the easement, the claim for compensation or damages remaining in the vendor. This was said to be "well settled" in the opinion of this Court in the *Roberts Case*, p. 10. See in addition to the cases there cited: *Rand* vs. *Townshend*, 26 Vt. 670; *Lewis* vs. *Ry. Co.*, 11 Rich. Law 91; *Kutz* vs. *McCune*, 22 Wis. 628; *Pomeroy* vs. *Ry. Co.*, 25 Wis. 641. Also 2 *Wood on Railroads*, pp. 994–5.

As said by the Court in *Toledo Ry. Co.* vs. *Morgan*, 72 Ill. 155: "If the grantor does not complain of damages done to his land before he conveyed it, the grantee certainly cannot." See *Davis* vs. *Ry. Co.*, 30 Am. and Eng. R. R. Cases, 341, and note, p. 344; *Dixon* vs. *Ry. Co.*, 1 Mackey 78; *Wabash Ry. Co.* vs. *McDougall*, 118 Ill., 229; and cases cited in Rapalje and Mack's Digest of Railway Law, vol. 4, p. 561.

III.

The foregoing propositions may be, and we think are, decisive of this case. But the first and main question presented upon the former argument remains still the

most important question in the case, and we think the question to which the answer is plainest. It is important far beyond this particular case. For there are very few miles upon any land grant road where the constructed line did not deviate from the map line. The case of *Missouri, Kansas & Texas Ry. Co.* vs. *Cook*, 163 U. S., 491, has been understood by many as holding, that in all such cases of deviation the railroad company has no right of way. Upon this understanding many litigations are now pending, and more are threatened, against the title of railway companies to right of way heretofore supposed to be undoubted; right of way occupied without question for many years. It is extremely desirable, from every point of view, that a rule be laid down in this case which will settle such controversies. Therefore, at the risk of repeating what has been already submitted to the Court, we desire to present briefly our views upon this proposition.

THE MAP OF LOCATION FILED WITH THE DEPARTMENT OF THE INTERIOR DOES NOT FIX THE RIGHT OF WAY, BUT THE COMPANY TAKES SUCH WAY ACCORDING TO ITS CONSTRUCTED ROAD.

Section 2 of the Northern Pacific act says: "Said way is granted to said railroad to the extent of two hundred feet in width on each side of *said railroad* where *it* may pass through the public domain." There is no reference in this section to a map. Naturally and gramatically read, this language constitutes a plain present grant, without condition and not dependent upon filing a map.

Section 3 of the same act grants the alternate sections of public land. And these are granted, not on each side of the constructed road where *it* may pass through the public domain, as is the case with the right of way, but upon each side of a *line of location to be designated on a map* filed by the Railroad Company with the Department of the Interior.

It had been decided before the Cook case by Mr. Justice Field at the Circuit in *Central Pacific R. R. Co.* vs.

Dwyer, 1 Saw. 641, and by this Court in *Railroad Company* vs. *Baldwin*, 103 U. S. 426, that the right of way grant was unconditional; that the conditions attached to the grant of alternate sections specified in Section 3 related alone to the lands granted in that particular section and could not be translated and read into Section 2, which was purposely and designedly left by Congress without conditions. This Court said in the Baldwin case:

> "Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

While the particular question in these two cases was, whether the conditions of Section 3, as to land claimed, sold, etc., before definite location, could be read into Section 2, there is no more ground for saying that the condition of Section 3 as to map can be read into Section 2. If any one of the conditions attached by Congress to the grant under Section 3 can by construction be read into the grant made in Section 2, there is no reason why all the conditions of Section 3 should not be in the same manner read into Section 2. Not only does the plain, natural and grammatical construction of these sections compel the conclusion, that Section 2 is a grant without condition and without reference to a map, while Section 3 is conditioned upon the filing of a map, but this Court, we think, so adjudicated in the Baldwin case, and Mr. Justice Field so decided in the Dwyer case. These decisions, we submit, settle the question unless they are to be overruled.

We think it will not, and cannot be, controverted, that had the company built its road it would have become entitled to the right of way granted by Section 2, although it failed entirely to file any map of location. Such failure would forfeit its land grant, but could not forfeit its right of way, because the grant of way is not made upon condition that a map shall be filed. If this be admitted, it settles the controversy.

We submitted on the prior argument certified copies

from the land office of two railroad location maps. One of these maps was of the Northern Pacific location past the premises in question. It shows the location from the Red River of the North to the Missouri, a distance of two hundred miles. The government surveys had been made for but a small part of this distance, and indeed for the most part the land grant roads were located in advance of the surveys. The Northern Pacific was mostly located in advance of the surveys, and this was intended by Congress; for it is provided in Section 6 of the charter that the surveys shall be made "as fast as may be required by the construction of said railroad." A map *could* not be made in advance of surveys which would fix the right of way boundaries. The files of the land department will show that land grant roads have been located in long sections, frequently one map showing many hundred miles of road. Not a map was ever filed, or ever requested by the department, on a scale large enough and with sufficient detail of reference so it *could* fix the right of way. No monuments, surveys or measurements were required to be noted on the map. The very line on many of these maps designating the railroad location would, when scaled for width, be found wider than the right of way granted. The reason of this is not far to seek. The department never understood that the map fixed the right of way. It never sought to determine its boundaries; it never surveyed it and did not except it in its patents. *Ex parte Arnett*, 20 L. D. 131; *Dunlap* vs. *Shingle Springs Ry*,, 23 L. D. 67. This practice of the department is a long-continued construction of the act of Congress. A construction that the right of way did not depend on the map and was not indicated or fixed by it, the right of way being granted by Congress where the road was built and being entirely useless to the company if granted in any other place. Is it not irrational to say that right of way is fixed and determined by something which cannot fix it; by something which no engineer could take and, from it, lay out the right of way on the ground? Does not such a construction create a litigation between every land

grant road and every adjoining land owner as to the boundaries between them? If the constructed road does not determine the right of way boundaries, the right of way of every land grant road is a float to-day, with its boundaries entirely *incapable of determination.*

Our construction harmonizes the law of right of way under special charters with the law of right of way under the general act of 1875, as decided by this Court in *Washington & Idaho R. R. Co.* vs. *Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77. And there is no reason why there should be a different rule. Congress, in the act of 1875, Section 4, recognizes the impossibility of designating right of way by map through an unsurveyed country, by providing in such cases that the map shall be filed within one year *after the surveys.*

There is no analogy between the right of way grant and a grant of odd sections; no reason in the nature of things why, because the odd sections granted are determined according to the location map, the right of way must also be determined according to the same map. The department of the interior, under the policy which Congress had adopted, of leaving the country open for settlement in spite of railroad grants, needed to have a map by which the sections granted to the railroad company could be determined, and the country so kept open to settlement without depriving the railroad company of the land intended for it. But, as this Court said in the Baldwin case, there is nothing in the policy of the government which requires that the right of way should depend on any condition like the filing of a map, because lands sold by the United States before the road was built would not be less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. Moreover, unless the department was to fix the limits of the right of way, and reserve it in its patents, there was no reason why it should be informed of its boundaries.

The question was suggested on the former argument by Mr. Justice Harlan, whether our construction did not leave the company free to build its road through *any por-*

tion of the public domain and claim a right of way. In answer we suggest first, that there is no pretense in this case of any unreasonable departure from the route specified by Congress. The defendant in error on the contrary offered to prove on the trial, that the departure in question was necessary for good engineering reasons in order to secure a better approach to the Missouri River bridge. But there are several limitations on a company, which would prevent such unreasonable departure from its line as the learned Justice had in mind. First, the Northern Pacific charter (Section 1) was "to build a continuous railroad, beginning at a point on Lake Superior, in Minnesota or Wisconsin, thence westerly by the *most eligible route*, as shall be determined by said company within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound." It is settled by decisions of this Court that the company could not make an unnecessary and unreasonable departure from the most direct and feasible route. Second, this Court decided in *Van Wyck* vs. *Knevals*, 106 U. S. 360, that the constructed line might deviate from the map line without a forfeiture of the land grant, but that the odd sections to go to the company were to be determined according to the map of location; with this further intimation (p. 369), that a deviation beyond the limits of the grant might constitute a forfeiture. See, also, Secretary Lamar's decision *In re Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 6 L. D. 209. So that it is probable the right of way might be forfeited by deviations beyond the limits of the grant. Third, Section 4 of the Northern Pacific charter provides, that whenever the company shall have completed twenty-five consecutive miles of road, the President of the United States shall appoint three commissioners to examine the same; that the commissioners shall report to the President, and if it shall appear that said road has been completed in a good substantial and workmanlike manner, and in all other respects as required by the act, the commissioners shall so report, and patents shall thereupon be issued to the company. The act therefore places it within the power of the President and his commissioners to determine

whether the road is properly located; this is a sure guaranty against unreasonable and unnecessary deviation.

IV.

The record shows that the section of road through the premises in controversy having been completed, commissioners were appointed by the President under Section 4 of the Northern Pacific charter and reported to the Secretary of the Interior, November 24, 1873. November 28, 1873, the Secretary recommended to the President acceptance of this report, and the recommendation was approved by President Grant, December 1, 1873. As before shown, the land on which the road was built was public land of the United States at this date. The report of the commissioners (Transcript, p. 25) says, among other things:

> "After a thorough examination, we find that the line is so located as to serve the purpose both of a central and convenient channel for the trade and travel of the country through which it passes, and that proper regard has been paid to future as well as present needs of local and also of through traffic."

Attached to this report was an accurate map showing the exact location of the constructed road (Transcript, p. 25). In the report was a recommendation that the road be accepted by the government (Transcript, p. 29).

This executive action accepted the line actually constructed across the premises in question and so shown in the report in satisfaction and performance of the requirements of the company's charter. The land being public land of the United States at that time, it was within the jurisdiction of the Secretary of the Interior, and the action shown should be treated as the determination of a special tribunal created by Congress to pass on the question not subject to review in the courts. This acceptance was an acquiescence by the United States, binding on its subsequent grantee, in the appropriation which the company had made of this right of way. The opinion of Secretary Lamar, in the case of

Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 6 L. D. 209 applies. The Secretary was considering deviations made necessary for engineering reasons, and adopted the opinion of the Attorney General (16 Opps. Atty. Gen. 457) as follows:

> "Some deflections must in many cases be expected from the line of the road as definitely located; but it is for the department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern in all cases. * * * I would suggest that, if the deflections be in their character immaterial—if they are made for the purpose of avoiding engineering obstacles, which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location."

V.

We submit that the opinion in *Missouri, Kansas & Texas Ry.* vs. *Cook* follows, contrary to the language of Congress, to which attention has been called, a mistaken analogy between the grant of right of way and the grant of odd sections; an analogy only to be established by incorporating into Section 2, which was passed by Congress without condition, the conditions which Congress attached to the grant of odd sections made in Section 3. That this can not be done had previously been held by this Court in the Baldwin case.

But even if the Cook case is to stand, it is controlling only upon the particular facts therein considered and cases involving similar facts.

This case is distinguishable in essential particulars. First, the record in the Cook case contained a stipulation, which showed that the right of way in question had not been approved by the President. Here it has been. Second, intervening rights had attached in the Cook case

before the company changed its line. Here none had attached, and this fact brings this case directly within the decision in *Washington & Idaho R. R. Co.* vs. *Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77.

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Counsel for Plaintiffs in Error.

No. 93.

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CLERK

Sup. Brief of Holcomb for P.E.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 93.

Filed Feb. 24, 1898.

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, *Plaintiffs in Error,*

vs.

PATRICK R. SMITH.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF

On Reargument for Plaintiffs in Error, filed on special leave of Court.

C. W. HOLCOMB,
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BYRON S. ADAMS PRL., 513 ELEVENTH ST.

Supreme Court of the United States.

OCTOBER TERM, 1897.

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NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, *Plaintiffs in Error,*

vs.

PATRICK R. SMITH.

ERROR OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ON REARGUMENT.

Supplemental Brief for Plaintiffs in Error, filed by special leave of Court.

The "Statement of Facts" and "Assignment of Errors" herein are taken from the brief of C. W. Bunn, Counsel for Plaintiff in Error, filed in the office of the United States Supreme Court October 22, 1897.

STATEMENT OF FACTS.

This is a writ of error to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment determining that Patrick R. Smith (plaintiff in the Circuit Court) is entitled to possession of the lands in controversy and to recover from plaintiffs in error the sum of $30,024.21 damages for withholding said property.

The action is brought by Smith in the Circuit Court of the United States for North Dakota. The property in dispute is described in the complaint as lots 5, 6, 7, 8, 9, 10, 11 and 12, block 8, according to the plat of Bismarck, North Dakota. In fact, it is, and has been since the construction of the Northern Pacific Railroad, occupied by the main and yard tracks of that road in Bismarck, and all lies within 200 feet of the center line of the main track.

The Railroad Company in its answer alleged lawful possession and title under the charter of the company (Act of Congress July 2, 1864). The answer pleads also a general denial and former adjudication in favor of the Railroad Company denial in the courts of the Territory of Dakota: (Transcript, p. 5).

The Circuit Court on a former trial rendered judgment on the merits against the plaintiff, which was reversed by the Circuit Court of Appeals: *Smith* vs. *Northern Pacific R. R. Co.*, 58 Fed. Rep., 513, 7 C. C. A., 397. On the second trial the judgment was rendered which is here for review; it was affirmed by the Circuit Court of Appeals, 69 Fed. Rep., 579: (Transcript, p. 60).

The case at the Circuit was tried by the court, a jury being waived. The court's findings are at pp. 15–17 of the Transcript. A bill of exceptions was settled and is printed at pp. 20–46 of the Transcript. The findings show this state of facts:

The plat of Bismarck was formerly known as Edwinton, its name having been changed by act of the legislature. The property in dispute was part of an 80 acre tract entered by John McLean as mayor of the city of Bismarck on behalf of its inhabitants under the Townsite Act (Revised Statutes, sec. 2387), and patented to him thereunder July 21, 1879: (Transcript, p. 15). The corporate authorities subsequently conveyed to the defendant in error: (Transcript, p. 15).

The court further finds that this 80 acre tract was selected as the location of a portion of the townsite prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior & Puget Sound Land Company (which company made such selection) sold lots upon this townsite according to a plat which was afterward, February 9, 1874, recorded with the

Register of Deeds of the County. By January, 1873, thirty buildings had been erected on the townsite, and from that time to 1879, when patent issued, the population continued to increase. It was upon the townsite *thus* selected and the plat *thus* made, which was afterward adopted as the site of the City of Bismarck, that the patent to McLean was based. The patent contained no reservation of any right of way for the Railroad Company: (Transcript, p. 16).

Note that no selection or entry was made by the TOWN *authorities, and no proceedings instituted in the land office (so far as the record shows), prior to patent July 21, 1879.*

The public survey of the township containing the 80 acre tract was made in October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

The foregoing is the title of the Defendant in Error. That of the Northern Pacific Railroad Company is as follows:

The company claims under the act of July 2, 1864, creating the corporation, sec. 2 of which act grants to the company a right of way 200 feet on each side of the *railroad* where *it* (the railroad) may pass through the public domain. On February 21, 1872, the company filed in the Interior Department its map of general route east of the Missouri river. This route passed about three-quarters of a mile south of the said 80 acre tract. May 26, 1873, it filed its map of definite location, which was accepted by the Commissioner of the General Land Office. The line of definite location, according to this map, passed about two miles south of the land in dispute. During 1872 some grading was done on the map line. During 1872 the company staked out a line across the property in question substantially where the track was afterwards built. This line was graded in 1873, and in June, 1873, the track laid where it has ever since been. The grading on the map line two miles south was abandoned. The property is within two hundred feet of the main track as constructed: (Transcript, pp. 16, 21).

As to former adjudication the facts found by the court are: In the year 1877 the Railroad Company commenced an action in the District Court of Burleigh County, Territory of Dakota, in which county the premises were situated, against Patrick R. Smith, defendant in error here, and others, to

recover possession of part of the premises in question, Smith being then in possession. The court had jurisdiction of the parties and subject-matter, and the Railroad Company recovered a judgment against Smith for the possession of said premises, and nominal damages for withholding the same: (Transcript, pp. 16, 17).

The complaint of the Company in the former action alleged "that the Northern Pacific Railroad Company is a corporation created by and exists under an act of the Congress of the United States entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' approved July 2, 1864. * * * * That in May, 1873, plaintiff became seized in fee for the use and purpose of a right of way to the following premises." Smith was alleged to be in actual and wrongful possession. He demurred to the complaint. The demurrer was overruled, and judgment thereupon rendered for the company to the effect before stated: (Transcript, pp. 12–15).

It is agreed in the record that the value of the use of the whole premises here in question was $26,000, and omitting that part thereof described in the complaint in the former action, $21,000: (Transcript, p. 10). The plaintiff's recovery below was for $26,000 and interest, and for possession of the whole property. The former adjudication was held to be no bar either in whole or part to this action. A finding dividing the damages was requested, denied and exception taken: (Transcript, pp. 43–45).

Upon the trial plaintiff in error offered in evidence the complaint in said former action to show that the plaintiff in error there claimed the land as its right of way under the act of 1864, and recovered it in the former action upon that ground. This evidence was excluded by the court and the plaintiff in error excepted: (Transcript, p. 35).

Upon the trial plaintiff in error offered to prove that after its road had been constructed over and beyond the premises in dispute, commissioners were duly appointed by the President of the United States under the provisions of sec. 4 of its charter, to examine and report thereon; that they performed their duty and transmitted their report to the Secretary of

the Interior, by whom it was forwarded to the President November 28, 1873; that this report was approved by the President December 1, 1873; that the report referred to contained an exact statement of the location of the constructed line of plaintiff in error, and an approval thereof. This offer was rejected and plaintiff in error excepted: (Transcript, pp. 22–30).

The plaintiff in error offered in evidence on the trial depositions of two civil engineers, Charles A. F. Morris and Montgomery Meigs. These depositions are in the record, and they tend to show that lines of definite location on maps are not necessarily or usually the exact lines of construction. That actual construction deviated in this case, and customarily does on all roads, from the map of location for good engineering reasons; that difficulties always develop and economies become apparent upon construction, which cannot reasonably be foreseen at the time of location. These depositions were excluded by the court and plaintiff in error excepted: (Transcript, pp. 31–41).

It will be noted that all the maps and public documents referred to in the findings, stipulations and bill of exceptions (or copies thereof) are made part of the record and may be used, read or referred to by either party and considered by the court: (Transcript, pp. 45–46).

The material parts of the act of July 2, 1864, are sec. 2 and sec. 3 which are as follows:

> SEC. 2. AND BE IT FURTHER ENACTED, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said Corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof; said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turn-tables, and water

stations, and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of this act, and acquired in the donation to the (road) named in this bill.

SEC. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the "Northern Pacific Railroad Company" its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this

act: Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word "mineral," where it occurs in this act, shall not be held to include iron and coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said "Northern Pacific Railroad."

ASSIGNMENT OF ERRORS.

The Plaintiffs in Error assign upon this record, and will rely upon, the following errors:

1. The courts below erred in ruling and holding that the Northern Pacific Railroad Company did not have title to the land in controversy as part of its right of way under sec. 2 of the act of July 2, 1864.

2. The courts below erred in ruling and holding that the defendant in error did have title to the land in controversy under the patent to McLean of July 21, 1879, and the subsequent conveyance under said patent to defendant in error.

3. The courts below erred in ruling and holding that defendant in error had any title or right to the possession of said premises.

4. The courts below erred in ruling and holding that said former judgment was not a bar to this action, and in excluding from evidence the record in said former action.

5. The courts below erred in ruling and holding that said former judgment was no bar, at least as to that part of the premises involved directly in the former action and as to $5,000.00 and interest of the judgment for damages awarded.

6. The courts below erred in excluding from evidence the testimony showing the acceptance by Commissioners and by the President of the constructed line under the act of July 2, 1864.

7. The courts below erred in excluding from evidence the deposition of Mr. Morris and Mr. Meigs.

ARGUMENT.

We request that the omission in this brief of a discussion of any of said matters of fact, or errors assigned, be not taken as a waiver thereof. What this brief does not expressly argue it is presumed will be fully presented in the brief of the senior counsel of plaintiffs in error.

The right of way granted to said company was a grant *in præsenti* "*be, and the same is hereby, granted,*" etc. (Schulenberg *vs.* Harriman, 21 Wallace, 44.) * * * "*Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad.*"

It was a present grant for said entire width. The grant was to said company, its successors and assigns, "for the *construction* of a railroad," etc.

(Sec. 2, act of July 2, 1864, Statutes at Large, Vol. 13, page 367.)

It was an unconditional grant.

The Court, in St. Joseph & Denver City Railroad Company *vs.* Baldwin (13 Otto, p. 426), said:

"But the grant of the right of way by the 6th section contains no reservations or exceptions. *It is a present absolute grant,* subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms," etc.

The said language is equally applicable to the grant of the right of way in the case at bar, the grants being identically the same in the respect aforesaid.

In the case at bar, as appears from agreed statement of facts, pages 8 *et seq.*, transcript of record, the land involved was selected for a portion of the townsite of Bismark, and surveyed prior to June 20, 1872; lots were sold within that selection in 1872, and occupied by buildings prior to January, 1873. The selection and plat of the townsite were filed in the county, February 9, 1874. That townsite selected, platted and occupied was afterwards adopted as the site of Bismark, and upon that selection and plat patent was based which was issued to John A. McLean, Mayor, in behalf of the inhabitants, July 21, 1879, under section 2387 of the U. S. Revised Statutes relating to townsites.

The map of the general route of the railroad east of the Missouri river was filed in the Department of the Interior on February 21, 1872, and passed the tract in controversy about three-quarters of a mile south of it.

On May 26, 1873, the Company filed in said Department its map of definite location, of its line of road, and the line thus fixed passed about two miles south of said land in dispute. During 1872 grading was done on that last mentioned line, and also a line was staked out across the tract now in dispute; in the spring of 1873 grading was done upon this line thus staked out, and in June, 1873, the road was constructed across it, and has since remained and been operated upon it.

At date of the grant (July 2, 1864), it would appear that the said tract was unoccupied by any person, no claim had attached to it, and that it was then unqualifiedly subject to any disposition Congress saw fit to make of it.

It also appears that the tract was not entered and paid for, nor patented, at the date of the withdrawal on general

route, nor at date of the definite location of the route of the Railroad Company, nor at date when the road was constructed upon the land in question, and the road was constructed across the land prior to the townsite plats being made of public record in the county.

Confining our attention to said facts alone, and the propositions are to be considered which fall under the first question to which this Honorable Court directed attention in its order for reargument, to wit:

"Could occupants of public lands, before they were surveyed and declared open for settlement, by subsequently availing themselves of the town-site act, procure a title paramount to that of a railroad company which, under a previous grant by Congress, had taken possession before the town-site patent was granted? See Northern Pacific Railroad Company *vs.* Colburn, 164 U. S., 383."

We remark first:

The town-site laws, in their length and breadth, purposes and warrant, are merely pre-emption laws.

Pre-emption, under the public land laws, is the right of one party to purchase a tract in preference to any other person.

But it has been held by this Court that, prior to entry and payment, no vested right was in pre-emptors, and hence it was competent for Congress to make any other disposition of the land. This was the principle in Hutchings *vs.* Low, 15 Wallace, 77; in Frisbie *vs.* Whitney, 9 Wallace, 187; Wirth *vs.* Branson, 98 U. S., 118, and cases therein cited.

If this be the law (and it is nowhere contradicted), then it would appear that *an absolute grant* at any time prior to such payment and entry, or the acquisition of a vested right, would necessarily prevail over a mere occupancy and improvement.

Said absolute grant was not in the present case of the fee

to the land, but of an easement in it. That easement, however, was properly and plainly subject to said rule.

In Buttz *vs.* Northern Pacific Railroad Company (119 U. S., 55) this Court said:

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." See also U. S. *vs.* So. P. R. Co. (146 U. S., 570).

Land in said odd sections, within the granted limits, which was clear of claims at the said date of withdrawal on general route (February 21, 1872), was not thereafter subject to sale or pre-emption if it also fell within the granted limits after definite location of the line of the road, but passed to the grantee.

It was thus with the conditional grant of *lands*, as held by this Court.

The grant of the right of way, as aforesaid, was absolute and unconditional, as also held by this Court in parallel cases, but necessarily fell within the limits of the grant of lands. Hence, the grant of the right of way must *at least* have comprehended any lands which were clear of adverse right at the date and within the limits of such withdrawal on general route, and precluded the sale of any lands except such sale was, and remained subject to, that easement.

It, however, attached to the even as well as to the odd or granted sections, by its terms, if they were "public lands" *at date of the grant.* The withdrawal on general route was a legal notice to all men, in addition to the notice by statute, that

any subsequent occupation, or entry, or purchase, upon odd or even sections therein must be subject to said servitude.

These results are unavoidable, in view of what this Court has already held concerning the character of like grants of the right of way; the function of said withdrawal on general route, and the right of the Government to make the grant. It would seem to follow that the purchase, entry, and patent, to the Mayor of Bismark, as trustee, of the land now in question, all having been subsequent to the grant; to said withdrawal on general route, and all also falling within the granted limits of definite location, were likewise subject to said easement; for at date of said withdrawal on general route the lands were the property of the United States; were "public lands"—not private property—and fell within the plain language of the act, to wit:

"That the right of way *through the public lands* be, and the same *is hereby, granted*," etc. (Section 2, Act of July 2, 1864.)

Now, what are "public lands"?

This Court, in the case of Newhall *vs.* Sanger (2 Otto, 761), said:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Manifestly, and pursuant to said definition, they were such as were not in private ownership, and they were in the case at bar "subject to sale and disposal under general laws," or they could not have been subsequently purchased by the Mayor, as trustee.

A grant is a contract executed. (Fletcher *vs.* Peck, 6 Cranch, 87.)

A legislative grant cannot be repealed. (Town of Pawlet *vs.* Daniel Clark and others, 9 Cranch, 292.)

The granting act is a law as well as a conveyance, and such effect must be given to it as will carry out the intent of Congress. (U. S. *vs.* S. P. R. Co., 146 U. S., 570.)

The railroad, in the present case, was built; no forfeiture was declared, and none is now possible; the grant was anterior to sale, entry, and patent; the patent is thus necessarily subject to said servitude under the facts stated.

In Bigbee *vs.* Oregon & Cal. R. Co. (139 U. S., 663) this Court said:

"This very question arose in the Supreme Court of California in the case of Doran *vs.* Central Pac. R. Co. (24 Cal., 245), in which the court observed (p. 259) that 'the grant by Congress of the right of way over any portion of the public land, to which the United States have title, and to which private rights have not been attached under the laws of Congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering, in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry.' We regard this exposition of the law as sound," etc.

This would seem to be quite conclusive upon the precise point now under examination. The Northern Pacific Company, under it, could not be defeated by settler claimants either individual or in the capacity of a townsite, because the United States *had title* and made said absolute grant, and there was then no adverse right or claim.

It is also proper to state that it was not essential to the right of way of said company that the patent should recite that right, or in form contain a reservation of it from the title conveyed. It is not the practice to include such reservations in patents.

The United States, no more than a private individual, can convey a greater title than it has in itself.

When it executed the patent and made the sale to the Mayor of Bismark, it had the fee to said tract *less* the right of possession and use which had been granted by section 2 of said Act of 1864. It could by no possibility convey more to the Mayor, and it was not in the power of its agent, the Commissioner of the General Land Office, to convey more. Hence that patent must be construed with reference to said grant, and declare its value to be the fee qualified by said easement. The record of the right of the company was to be found in the public grant; the records of the Interior Department, and the construction on the ground.

If, however, as in this case, a different construction of said patent has been adhered to in the court below, we respectfully submit that the law and right should be declared by this Court.

In the case at bar there was simply a deviation of constructed road from the line of definite location. Everything else was *strictly* and conclusively in favor of the Company.

The decision below holds that the Company by filing its map of definite location exhausted the right of selection given by Congress, and irrevocably fixed the line of this railroad and the limits of the right of way granted to it as against third parties holding under patents from the United States.

What we have already said in part answers this. So far as the *patent* was treated as concluding the Company, it seems to us quite clear that *its* value should be declared. It does not seem to us that the courts have authority to ignore a grant made by statute, or decline to give each—grant and patent—their respective value.

This is not answered by the claim that the action in this case is in ejectment where the title a man has must prevail, and not the title which it may be he ought to have. For

there is no higher muniment of title than an unconditional grant from Congress; or, a grant with implied conditions which have been fulfilled.

That grant is in a public law; under it plaintiff in error is in actual possession, and he pleads that title and its record.

The Company *has* that title—not in the form of a patent, but in the form of a prior *grant* by Congress, and the grant is in court as certainly as is the patent.

A deviation of constructed road from the line of definite location in cases like this one appears already to have been passed upon by this Court.

We cite the case of St. Joseph and Denver City Railroad Company *vs.* Baldwin (13 Otto., 426).

The date of the grant in that case was July 23, 1866 (14 Statutes at Large, 210). At that date the land was vacant and unoccupied and belonged to the United States.

Baldwin acquired whatever rights he possessed in October, 1869.

The line of road was definitely fixed in October, 1871.

It is to be noted that by section 6 of the granting act (on page 211 of 14 Statutes at Large) the grant of the right of way is substantially identical with that in section 2 of the granting act in the case at bar (page 367 of 13 Statutes at Large).

The Court said that the act made two grants—one of lands and the other of a right of way; that the grant of the right of way was "a present absolute grant, subject to no conditions except those necessarily implied, such as that the road should be constructed and used for the purposes designed."

Also:

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where

any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

The railroad company in that case claimed that Baldwin took the land subject to its right of way. Baldwin claimed that the company's right of way took effect only from the date at which the company filed its maps designating the route with the Secretary of the Interior. This Court held that the act was operative upon "*all persons* acquiring *any portion* of the *public lands, after the passage of the act* in question."

In other words, it was a grant *in præsenti* and took effect from its date, and all persons were chargeable with notice from the public statutes.

It will not clear away difficulties real or imaginary to say that the question in that case was not the precise one arising from a definite location of the route upon one line, and the subsequent construction of the road upon another line; because the Court took pains to clearly explain that the purpose of the definite location of that line was to fix the limits of the *grant of lands* so that what would not be taken by it would be open to settlement and purchase. It also emphasized an important point when it declared that the lands would not be the less valuable for settlement because a road should run

through them. This is important as showing that Congress by a present, absolute, unconditional right of way, did not consider it a burden or loss to settlers, but an advantage; and thus was the theory rebuked which gave rise to those contentions of a settler or owner who would by such legislation first profit himself and then punish the company whose construction of the road brought him such advantage.

But the direct and most important points decided were that the right was effective from date of the act, and was not dependent upon the definite location.

But here it is quite natural that it should be urged that, as the definite location in that case was subsequent to Baldwin's settlement, his claim was of course subject to the right of way on the line of that definite location, and that the point of deviation in construction from that line of location was not in the case.

Well, we refer to this case in connection with this point for what it contributes to the proposition of such deviation, as found in other cases we will cite directly.

But we note in this case as follows: That the line of definite location was virtually eliminated from consideration. The Court said it was for another purpose. It did *not* say that the grant of the right of way derived any force or control in that case from the *construction line* being the *line of definite location*. In fact, we do not see that the point was either made by Baldwin or respected by the Court as in any event material. Had it been material it is presumable that it would have been given a clear statement.

Now, we submit, that if the line of definite location of route, and the line of construction of the road must be identical, we must look somewhere else than to that case for the authority.

We also submit that there is no express authority to that effect in the act which made the grants in that case, and no

provision to that effect in the acts relating to the Northern Pacific Railroad Company.

If we are right in this, then, if such be the law, it is to be found in the principle involved, and in what is necessarily implied from the grant itself.

But this Court said in case of U. S. *vs.* Southern Pacific R. Co. (146 U. S., 570): "The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant."

Hence, is it not an assumption, not strictly warranted, that the definite location of the line of route, and which is expressly declared by this Court to be for one certain purpose, is to be absolute or potential for another purpose?

In Missouri K. & T. R. Co. *vs.* Roberts, (152 U. S., 114), the right of way involved lay across lands in reservation for the use of Indians. This Court said that the United States had the right to authorize the construction of the road through the reservation, and to grant absolutely the fee of the two hundred feet in width as a right of way to the company.

In that case the act granting lands and the right of way (July 26, 1866, 14 Statutes at L., 289) provided, "that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to *locate the route* of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States."

The Court said that the company located its road through those reserved lands with the approval of the President,

"and constructed the road in *substantial* conformity with the act of Congress."

That the right of way was granted unconditionally, subject only to said approval by the President, and the title "vested in the company either upon the passage of the act of Congress, July 26, 1866, or upon the construction of the road, and so far as the present case is concerned, it does not matter which date be taken."

Here it may well be noted that upon the definite location of the road and the filing of map in the Land Department the grant to the odd sections attaches, and if they be clear of adverse claim, the title *eo instanti* passes out of the grantor and into the grantee.

But this Court does not say that in respect of the right of way grant. It says it vested in the grantee either at *date of the granting act* or *upon the construction of the road.* This is an express holding, and gives the definite location no control whatever in the matter. That language was explicit. It could apparently have but one meaning.

We invite attention to two other points in that decision:

1. That mere *occupancy* under a *right* of occupancy secured by treaty, did not interfere with the right of the United States to grant said right of way, or of the company to occupy, construct, and take title. Reverting for a moment to the townsite of Bismark *prior* to its entry and patent, it may be remarked that occupancy alone has no precedent for controlling and defeating the present grant of Congress. Even had there been actual townsite occupancy at date of the granting of the right of way to the Northern Pacific Railroad Company (which was not the case), yet there was no claim of record; it was not known to the law; it did not remove the land from Government ownership, nor vest a right in the occupants as against the United States, and

hence constituted no obstacle to the absolute grant to another, which would, of course, rest in public policy. Land in that condition may, as a fact, be occupied, and yet without any certainty that such occupation will be continued, and without any notice that it is intended to be continued, or law which limits Congress in the disposition of it, while at the same time, it might be conceded that under the general laws, as between the town and another party, such occupation might defeat the other party, ~~under general laws~~.

2. That the Court had in mind the *location of the route* through said lands, and evidently the point that there was at least a slight deviation of the constructed road from such location, and hence referred to a construction "in substantial conformity with the act of Congress" as all that the law could be construed to contemplate.

Also in the case of Bybee *vs.* Oregon & California Railroad Company (139 U. S., 663), this Court made a sharp distinction between the right of way, and the right to lands under the grant:

"The distinction between a right of way over the public lands, and lands granted in aid of the construction of the road, is important in this connection. As to the latter, the rights of settlers or others who acquire the lands by purchase or occupation between the passage of the act and the actual location, and the identification of the lands are preserved unimpaired, *while the grant of the right of way is subject to no such condition;* and in the construction given by this Court to a similar grant in St. Joseph & D. C. R. Co. *vs.* Baldwin (103 U. S., 426), a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railroad company," etc.

Now, in this, no mention is made of the line of definite location.

It is expressly declared by this Court that such line is for

another purpose, and is *not* to control the right of way; and it would clearly seem to follow that while such line is absolutely controlling in respect to the grant of *lands*, it can be only a tentative matter in respect of the constructed road and has no conclusive force to determine the exact right of way.

Were it otherwise, how would it be an absolute and unconditional right?

Also, in the reason of the thing, in view of engineering difficulties notoriously existing and to arise in a grant to a railroad which is to run through a large extent of country diversified by mountain, swamp, hidden quicksand, and obscure and unknown natural obstacles which could hardly be well understood in advance of construction; the development of centers of trade and population which required slight deviations in order to answer public convenience, or even necessities—a matter of some force in a grant made from public considerations—all these things emphasize the reason why the right of way should have been given with the purpose that it should take effect at date of the grant and control on the line of actual construction.

Now, having seen from the decisions of this Court, and the purpose and reason of the statute, what the intent of the law is and its express grant contemplates, to wit, that the right of way is to relate to the date of the grant, and to take effect as to any particular tract at the date of construction, it is proper to see what relation it has and ought to have to the route marked by the line of definite location.

Let it be remembered that there is not a word in the grant which expressly provides that the construction shall be upon the exact line of definite location; that said line is required to be fixed so that it may be ascertained with certainty what lands are to be held to satisfy the grant of lands to the company, and what lands are to be open to settlement and entry

by our citizens, and that this Court has expressly held that all settlements and claims initiated subsequent to an unqualified grant of the right of way are subject to it, notwithstanding they antedate definite location and construction.

There is in the nature of the grants a connection of law as to the limits within which the construction of the road may vary but outside of which it cannot go.

That is fairly indicated by the decision in Van Wyck *vs.* Knevals (106 U. S., 360). In that case it was contended that the right claimed under the St. J. & D. C. Railroad Company, to whom a grant of lands was made by act of July 23, 1866, was invalid for different reasons, among which was the charge that the constructed road deviated from one to three miles from the route or line of definite location laid down on the map. The Court said :

" As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it ; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the land granted, might, perhaps, raise the question whether the grant was not abandoned ; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant."

In the matter of the location and construction of the Chicago, St. Paul, Minneapolis & Omaha Railway Company (6 Land Decisions, 209), Secretary Lamar, in the matter of the adjustment of the land grant of said road, referred to the failure of the company to construct its road upon the line of definite location, and to said case of Van Wyck *vs.* Knevals, quoting the paragraph as above, and said :

" From the foregoing extract, it is apparent that the Supreme Court did not regard a deviation in the construction of

the road from the line marked on the map as a matter which required the consent of Congress, so long as such deviation or deflection did not 'take the road beyond the granted limits.' In the present case the deflection is nowhere over eight miles from the line of location, whilst the granted limits are ten miles on each side thereof. The case of Van Wyck *vs.* Knevals, *supra*, was decided at the October term, 1882, of the Supreme Court; but prior to that time this Department had made substantially the same ruling in certainly three cases."

He quoted from the opinion of the Attorney-General in one of said cases, who held that to entitle the State to the benefit of the lands granted, it was necessary that the road should be constructed according to the line of definite location, and if a different road be constructed than that definitely located, the *State would be entitled to nothing under its grant.* But whether the road as constructed is or is not the road definitely located, it was held, was a question for the Interior Department to determine, and was one largely within the discretion of the Secretary. On this point he quoted from the Attorney-General's opinion (16 Ops. Atty.-Gen., 457):

"Some deflections must in many cases be expected from the line of the road as definitely located; but it is for the Department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern all cases. * * * I would suggest that, if the deflections be in their character immaterial—if they were made for the purpose of avoiding engineering obstacles, which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location."

Secretary Lamar referred to the Department rulings theretofore made to like effect, agreed with them, and decided accordingly in the case before him.

It may be said, so far as we are advised, that said rule has obtained and been the rule of the Executive Department from first to last, and that the said decision in Van Wyck *vs.* Knevals was understood to be in support of the executive rule and practice.

The gist of that construction was that such deflection of the constructed road from the line of definite location as did not depart from the limits of the grant, and was in consequence of engineering obstacles which could not be otherwise avoided without exaggerated expense, was not regarded nor treated as any departure at all from the line of definite location, but as a substantial adherence to it, and in legal identity with it, and it was thus treated uniformly by the officers to whom was committed the administration of the granting acts.

Decisions and long-continued construction of law by the Land Department, while not binding upon this Court, are entitled to great respect, "and ought not to be overruled without cogent reasons." (U. S. *vs.* Moore, 95 U. S., 760.) See, also, Hastings and Dakota R. C. *vs.* Whitney (132 U. S., 357) and cases cited to like effect.

We submit that if a deviation of constructed road from the route fixed by the definite location, as aforesaid, does not destroy the identity of the route and road in the matter of the *conditional* grant of lands which was made dependent upon such route, then it would be illogical and erroneous to hold that it destroyed the *unconditional* grant of a right of way under the same facts.

In the case at bar the reasons for the deviation of the constructed road from the line of definite location to its line of construction are shown by the testimony, copy of which is

found on pages 31 to 34, inclusive, and 36 to 41 of transcript.

We submit that the objection thereto was not well taken; that the evidence was competent, relevant, and material. It could not be otherwise under the said construction of law, and the rule and practice of the Interior Department, justified by the aforesaid authority.

We now come to the decision in Missouri, Kansas & Texas Railway Co. *vs.* Cook (163 U. S., 491).

With profound respect for the great learning of this Court, and a keen sense of the prodigious labor required of its members, which sometimes must render mistake possible, we submit our belief that said decision in its broad statement was erroneous and should be overruled.

It is true that that case was peculiar in some of its facts; that there was a definite location presumably about December 24, 1867, an acquisition of claim by one Hodges thereafter, and a sale to him October 9, 1869, and subsequent to that sale a change of location which carried the road across his land at a time when he had a vested right, and it was not in the power of the Government to refuse him a patent.

The Court seem to treat the definite location as the establishment of a fixed line incapable of variation for any reasons. It quoted from Van Wyck *vs.* Knevals, *supra*, as follows:

"We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the

route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route."

It said further:

"The easement and the lands were afloat until by definite location precision was given to the grant and they became permanently fixed."

It referred to this fact of the location of line of route in 1867; the sale to Hodges in 1869; the new line of location run by the company in 1870, crossing the tract in controversy, and the patent issued to Hodges later in 1870.

The Court then said:

"The issuing of the patent shows that the land department had found the existence of all the conditions, such as actual occupancy of and residence on the premises and like matters requisite thereto, and it took effect by relation as of the date of the certificate. It follows that as the rights of the settler were required after the right of way of the road had been definitely located, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain, and he could not be deprived of rights which had thus attached by the subsequent action of the company."

The Court deemed it unnecessary to consider what effect, if any, deviations of that kind might have upon the grant (Van Wyck *vs.* Knevals, 106 U. S., 360; 16 Ops. Atty.-Gen., 457; 6 U. S. Land Dec., 209); as "whatever the rights of the company in this regard, such a change could not affect the rights of third parties, which had in the meantime lawfully intervened," citing Washington I. R. Co. *vs.* Cœur d'Alene R. & Nav. Co. (160 U. S., 77).

We do not think the last-named citation is an absolutely controlling one, inasmuch as the facts were not parallel.

That was a question of priority of right between two competing railroad companies, under the general right of way act of March 3, 1875.

Admitting that the line of location is definitely fixed by the map thereof filed in the Interior Department, it does not seem that it forbids variations made essential by engineering obstacles, etc. Those conditions have always prevailed with the officers of the Government to whom the law assigns the duty of executing the statute; and their construction of the grants on this point is and should be entitled to great weight. There is most reasonably a necessity for a construction such as is adapted to an application of the grant to the unavoidable conditions which at the date thereof were known to be inseparable from its enjoyment.

The said variations, within the limits of the grant, have not been regarded as a legal deviation from said fixed line of route, when made for any of said reasons. Those grants have been administered on the theory that such conditions as compelled the variations as aforesaid were inevitable natural conditions, notoriously possible everywhere, and necessarily contemplated as incident to the enjoyment of the rights conferred.

If the right of way be determined by the definite location, in the same manner and by the same act as the right to the granted lands, it would seem that it should not be lost by a slight deviation for said purposes, in consequence of which neither Court nor Executive Department has ever held that a single acre of the granted lands was forfeited. Why should said distinction be made?

If the company locates its line, and pending construction a physical obstacle such as justified a slight variation, under the uniform practice before stated, develops, is the company to be made to suffer a diminution of its right of way, or its loss altogether?

Were not said contemporaneous and long and unvarying practice and construction of the law, which permitted such variations for said reasons, notice to persons who in advance of the actual construction of a road sought to derive advantage from purchasing land so near the line of location as to easily be in reach of such unavoidable variations?

Is not this matter of variations within the limits of the grant of lands to be resolved by a construction made wholly reasonable by a recognition of notorious conditions in view of which every such grant has been made by Congress?

We submit very earnestly that the existence of said compulsory conditions, justifying a slight variation from the selected route, at the same time and by the same justification preserved the right of way in its entirety, and that it would be error to hold the contrary. The principle being admitted, that there is a right to so vary the constructed road, and it follows that the purchaser of the land across which such variation puts the road must be held to have had the same notice and liabilities within the possible limits of such legal variations as he had before definite location, and he should not be authorized to make the company pay for the right of way. It seems to us to be both unlawful and inequitable.

Finally, the prior holdings of this Court, that the grant of a right of way takes effect on construction of the road and passage of the granting act, seem not to have been considered in said Railroad *vs.* Cook decision.

But, should this Court adhere to its decision in the Cook case, we infer from that decision that it would be upon the ground that in that case it did not appear that any reason existed which under the general practice would justify the variation.

We do not notice that such a reason is given among the recited facts, and if the change of line was made from mere

caprice, or without sufficient justification, our objections to the conclusion in that case would disappear, and we would expect the full, and as we regard it the well-established, doctrine to be stated and deferred to in the case at bar.

And we ask that this be done, for it would seem obvious that an unqualified ruling, like that in the said case, standing without explanation, would unsettle citizens in respect of rights and adjustments which were theretofore regarded as concluded, and would probably result in much litigation without sufficient cause or any real grievance.

THE REPORT OF THE COMMISSIONERS APPOINTED BY THE PRESIDENT UNDER SECTION 4 OF THE GRANTING ACT OF JULY 2, 1864.

Said section 4 requires examination and report, upon completion of certain sections of the railroad:

"If it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the Commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road."

If the right to lands and the right of way be dependent on the same act, to wit, the definite location, and adherence to it in construction, then the report of said Commissioners is material on the point in question in the case at bar, for it must relate to the construction "as in all other respects required by this act."

On page 25 of Transcript is that part of the Commissioners' report relating to this matter, as follows:

"LOCATION OF THE ROAD.

"After a thorough examination, we find that the line is so located as to serve the purposes both of a central and con-

venient channel for the trade and travel of the country through which it passes, and that proper regard has been paid to future as well as to present needs of local and also of through traffic."

And on page 29, Transcript:

* * * "We find its construction and equipment throughout to be in accordance with the instructions furnished for our guidance by the Interior Department, and we therefore respectfully recommend the acceptance of the road by the Government."

In view of the foregoing requirement of section 4 of the granting act; of the report of the commissioners, and of the evidence on pages 31, *et seq.*, of Transcript, as to the necessity for the variation in construction which took the road across the tract in controversy at a time when the full title to it was in the United States, we regard said matter of consequence, and a very important aid to the ascertainment of the fact, whether the variation was only such as the law and practice allowed, for it was either a legal adherence to the line of definite location, or the report of the commissioners under said quoted statute was erroneous, and if the former, then the contention of defendant in error fails, because of the finding of fact by officers of the Government appointed by law to ascertain and determine the facts.

We have presented herein our view of the law which should prevail, and we leave the discussion of all other points to the regular counsel-in-chief of the company.

C. W. HOLCOMB,

For the Northern Pacific Railroad Co.